SINGAPORE REPORTS

Fima Construction Pte Ltd v Neo & Neo Brothers Pte Ltd & Ors

HIGH COURT (SINGAPORE) — SUIT NO 807 OF 1990
CHAN SEK KEONG J
22 JANUARY 1991

Land Law — Enforcement — Whether amounts to expropriation of plaintiffs' property by defendants — Whether defendants should be made to pull down wall entirely or shave the wall to remove the intrusion

Both the plaintiffs and the first defendants are property developers. The plaintiffs have developed a block of six terraced houses at Kovan Road, Singapore. The first defendants have developed the adjacent block of eight terraced houses. The said properties share a common boundary. The second/third defendants are the purchasers of one of the terraced houses from the first defendants under an agreement for sale. This house, No 73A Kovan Road, is erected immediately adjacent to one of the terraced houses of the plaintiffs ('the affected house').

The first defendants discovered in October 1989 that No 73A Kovan Road had encroached onto the plaintiffs' land when the latter's surveyors forwarded to the first defendants three copies of a survey plan. The plaintiffs' solicitors demanded the immediate removal of the encroachment and threatened to commence legal proceedings if the demand was not met. Thereafter, proceedings were commenced in May 1990, in response to which the first defendants counter claimed that the plaintiffs had, likewise, encroached onto their land. The plaintiffs had applied to continue an interim injunction obtained ex parte to restrain the defendants from further trespass and to pull down the intruding wall of No 73A Kovan Road and for summary judgment for damages and a permanent injunction. The defendants applied to discharge the interim injunction and for an interlocutory injunction against the plaintiffs on the basis of the counterclaim.

Held, refusing to grant a permanent injunction:

(1) First, the smallness of the encroachment, an area of about 3 sq ft distributed over the whole length of the boundary of about 25m, was regarded as de mininus. Second, the encroachment was trapped in between two walls which was functionally useless to both owners in that state. Without incurring additional expenditure, the plaintiffs would not benefit from the removal of the encroachment. Third, this situation was brought about by the plaintiffs deliberately completing their building with knowledge of the encroachment, and the additional expenditure was not justified. Fourth, the plaintiffs could have recovered the land encroached upon if they had erected their wall against the intruding wall, as in that event, the intrusion would have been physically and permanently annexed to the plaintiffs' wall. Fifth, there was no evidence that the affected house was unsaleable as a result of the encroachment or that any diminution in the sale price could not be compensated in damages.

(2) This was not a case of a deliberate encroachment but one due to carelessness. The encroachment has no effect on the living space within the four walls of the affected house. The only thing that was and continues to be affected is the notional boundary line. If in fact the plaintiffs had built their wall touching the entire length of No 73A Kovan Road, the legal problem might have resolved itself in that the boundary would then run in between the two walls. No evidence had been adduced by the plaintiffs to show why this could not be done.

(3) The principle to be applied is that of achieving a fair result in the circumstances of the case. In this case, the plaintiffs' refusal to build wall-to-wall had made it more difficult and costly to remove the encroachment. Even if the court were to order the removal of the encroachment by shaving the wall off, the plaintiffs would only have some air space trapped between two walls which is of no benefit to any party.

Cases referred to

1 *Tay Tuan Kiat* v *Pritam Singh* [1987] 1 MLJ 276 (folld)
2 *Charrington* v *Simons & Co Ltd* [1970] 1 WLR 725 (refd)
3 *Shepherd Homes Ltd* v *Shandham* [1971] Ch 340 (refd)

Cheong Tuck Meng for the plaintiffs.
Harry Elias (*Goh Yew Hock* with him) for the first defendants.
HK Koh for the second and third defendants.

Cur Adv Vult

Chan Sek Keong J: The factual background of these two appeals is as follows. Both the plaintiffs and the first defendants are property developers. The plaintiffs have developed a block of six terraced houses at Kovan Road, Singapore. The first defendants have developed the adjacent block of eight terraced houses. The said properties share a common boundary.

The second and third defendants are the purchasers of one of the terraced houses from the first defendants under an agreement for sale dated 5 October 1989. This house, No 73A Kovan Road, is erected immediately adjacent to one of the terraced houses of the plaintiffs ('the affected house'). The temporary occupation permit for No 73A Kovan Road was issued on 29 November 1989 and the certificate of fitness on 22 March 1990.

The first defendants first discovered in October 1989 that No 73A Kovan Road had encroached on the plaintiffs' land when the latter's surveyors forwarded, on 12 October 1989, to the first defendants three copies of a survey plan showing an encroachment as follows: area of wall = 0.24 sq m, area of hoarding = 0.2 sq m.

On 24 October 1989, the plaintiffs wrote to the first defendants on the encroachment and warned of the 'very grave repercussions to our present development. It affects both our plot sizes and our proposed alignments of the terrace block. Due to the state of our current works, our work schedule may also be affected.'

On 4 November 1989, the first defendants replied as follows:

> We sincerely regret what has happened on site. On behalf of the developer, M/s Neo & Neo Brothers Pte ltd, we suggest to shift the timber fencing to the appropriate position. As for the brick wall, compensation could be discussed other than the option of removing plastering of the brick wall.

It would appear that the first defendant had offered compensation based on the market value of the encroached land, but the plaintiffs did not accept and demanded the exorbitant sum of $500,000. Whatever the amount that was demanded, there was no settlement. On 4 December 1989, the plaintiffs' architects complained to the Public Works Department, but on 14 December 1989, the Building Control Division replied that it was a private matter. On 27 December 1989, the plaintiffs' solicitors came into the picture and did what they were instructed to do, ie to demand the immediate removal of the encroachment and to commence legal proceedings if the demand was not met. Thereafter everything went downhill, resulting in the commencement of proceedings on 7 May 1990, in response to which the first defendants counterclaimed that the plaintiffs had, likewise, encroached on their land.

At the time the plaintiffs' discovered the encroachment, they had not erected the house. They could then have come to court for a mandatory injunction to rectify what was then a 0.24 sq m of encroachment. They did not. Instead they proceeded to erect the affected house. When they erected the wall of the affected house adjacent to No 73A Kovan Road, they did not erect it against the wall of No 73A along their entire common boundary. They erected the wall in such a way as to leave a gap between the two walls. Counsel for the plaintiffs explained that his clients were advised to construct the wall that way so as not to trespass on the first defendants' land. I found this caution understandable, but I was unable to understand why the second wall should not touch the first wall as the first wall had already encroached on the plaintiffs' land! If this had been done, the legal problem before me might not have resulted or would have been resolved quite simply, as I shall explain.

Two further surveys of the encroachment were done. One was done on 12 July 1990 by an independent registered surveyor instructed by the plaintiffs. His survey showed two areas of encroachment along the boundary of 0.22 sq m and 0.47 sq m = 0.69 sq m. The other was done, surprisingly as this was a private dispute, by the Chief Surveyor pursuant to an order of court made on 3 August 1990. The Chief Surveyor's survey confirmed the earlier survey and also that the plaintiffs had not encroached on the first defendants' land.

When this matter came before me for hearing on 21 November 1990, there were five applications to be disposed of, as follows:

(1) Notice of motion filed on 10 May 1990 by the plaintiffs, in effect to continue an interim injunction obtained ex parte on 10 May 1990 to restrain the defendants from further trespass and to pull down the intruding wall of No 73A, Kovan Road, Singapore 1954.

(2) Notice of motion filed on 27 July 1990 by the first defendants to discharge the interim injunction.

(3) Notice of motion filed on 28 July 1990 by the first defendants for an interlocutory injunction against the plaintiffs on the basis of the counterclaim.

(4) S/C No 3008/90 filed on 1 June 1990 by the plaintiffs for summary judgment against the defendants for damages and a permanent injunction.

(5) S/C No 4224/90 filed on 31 July 1990 by the first defendants for summary judgment against the plaintiffs on their counterclaim that the plaintiffs had encroached on their land.

Counsel for the first defendants and for the second and third defendants conceded that there was no encroachment by the plaintiffs and consented to the dismissal of S/C No 4224/90 and also the first defendants' notice of motion filed on 28 July 1990, with costs to be reserved. I made the orders accordingly.

Counsel for the first defendants also admitted that on the basis of the independent survey there was encroachment on the part of his client. He was prepared to consent to judgment on terms to be worked out by the court. However, on ascertaining from counsel for the plaintiffs that the mandatory injunction was required because, otherwise, the plaintiffs' development could not be sold, and the reason was that the competent authority had refused the sale until the encroachment had been rectified. I was not convinced that the competent authority could have made such an unreasonable decision and that the extent of the encroachment could not have justified such a decision. Accordingly, having been told by counsel for the first defendants that no representations had been made by his clients on the problem, I considered it desirable that they be allowed to do so with a view to resolving the problem caused by the refusal. Accordingly, I adjourned the applications.

Soon after the adjournment, counsel for the plaintiffs sought an urgent hearing of the adjourned applications on the ground that the problem was not only with the competent authority. I granted it and the applications came on for hearing again on 4 December 1990.

At the adjourned hearing, counsel for the first defendants withdrew his offer to submit to judgment on terms, and I proceeded to hear submission.

With respect to the purported refusal of the Controller of Housing to allow the plaintiffs to sell their houses, the only evidence adduced by the plaintiffs in support was a letter from the Controller which was shown to me. In my view, the letter did not indicate an outright or final refusal.

There was also exhibited in one of the affidavits copies of correspondence exchanged between the plaintiffs and the Controller of Housing disapproving as part

of the prescribed sale agreement a new cl 23(b) which reads as follows:

> One particular plot of the housing estate is affected by an encroachment by the adjoining unit. This plot will be sold subject to such encroachment pending the outcome of legal proceedings being taken by our clients.
>
> Our clients intend to make it very clear to the purchasers of that particular plot that the sale and purchase of that particular plot is subject to such encroachment which they can inspect before entering into the agreement.

Counsel for the plaintiffs read the refusal of the Controller to accept this clause as his refusal to allow the sale of the houses. This, to my mind, was not the same thing. There was no reason why the prescribed sale agreement could not be used. All that was necessary was that the schedule to the sale agreement be completed accurately and that the prospective purchaser be given prior notification before he puts down his deposit for the option to purchase. Clause 23(b) would not really have assisted or protected the plaintiffs more than a simple disclosure in writing to the purchaser. The encroachment was so small that it could come within the terms of cl 20(2), (3) and (4) if there were prior disclosure. There would also be no misdescription of any kind.

The plaintiffs did not adduce any evidence that the saleability or the market price of the affected house was affected in any way by the encroachment. On the other hand, there was evidence that the cost of remedying the encroachment would cost the first plaintiffs much more than the plaintiffs would gain. There was evidence of a quotation of $40,000 just to shave off the intruding portions of the wall.

There was also an argument from counsel for the plaintiffs that his clients' development was in jeopardy in that the encroachment had caused them to contravene the conditions of approval for the development. It was said that the development was approved on certain conditions, one of which was that no plot would be less than a minimum area of 150 sq m for each house. It was alleged that as a result of the encroachment, the area of the affected house might be less than that. There was no evidence for this conclusion. It was derived from the plaintiffs' architect's initial calculation showing 150.01 sq m for the plot 1, presumably on which the affected house was erected. I did not see anything in these documents to justify a preliminary conclusion that the plaintiffs' entire development was in jeopardy because the affected house (and be it noted *not* the plot) might turn out to be less than 150.01 sq m by less than a sq metre. It should also be recalled that it was the plaintiffs themselves who deliberately erected the affected house in a way as not to touch the wall of No 73A. The first defendants might be responsible for the first error. But the plaintiffs were responsible for the second, it it be an error.

After hearing submissions of counsel, I gave interlocutory judgment for the plaintiffs for damages to be assessed, and costs. I decided, on the materials before me, that a mandatory injunction was not justified, and accordingly, I gave unconditional leave to defend for reasons which I shall give in a moment.

Following the orders in the O 14 application, (i) I made no order on the plaintiffs' notice of motion filed on 10 May 1990 with costs to be reserved, and (ii) on the first defendants' notice of motion filed on 27 July 1990, I discharged the interim injunction given on 5 October 1990, without prejudice to the plaintiffs' claim that part of the wall of No 73A Kovan Road is a continuing trespass.

The plaintiffs are dissatisfied with my orders on the two motions and have appealed. As I have said, these orders were made following my refusal to grant a permanent injunction under O 14 application. I now give my reasons for my refusal.

The first was the *smallness* of the encroachment, an area of about 3 sq ft distributed over the whole length of the boundary of about 25 m. I regarded that as de minimis. Second, the encroachment was trapped *in between* two walls which were functionally useless to both owners in that state. It would also remain in that state even if the court were to order the encroachment removed by means of shaving off the encroachment, as the plaintiffs would not benefit from the exercise unless they were to demolish their existing wall and build a new wall. In other words, without incurring additional expenditure, the plaintiffs would not benefit from the removal of the encroachment. Thirdly, this additional expenditure was not, in my view, justifiable as it was brought about by the plaintiffs deliberately completing their building with knowledge of the encroachment and failing to come to court for a mandatory injunction at a time when the cost to the defendants might have been much less. The cost to the defendants in removing the encroachment was disproportionate to the benefit that would accrue to the plaintiffs. This was, in a way, a Catch-22 situation created by the plaintiffs. Fourthly, the plaintiffs could have recovered the land encroached upon if they had erected their wall against the intruding wall, as in that event the intrusion would have been physically and permanently annexed to the plaintiffs' wall. Fifthly, there was no evidence that the affected house was unsaleable as a result of the encroachment or that any diminution in the sale price could not be compensated in damages.

Counsel also urged that the law should not sanction the expropriation of the plaintiffs' property. I agreed with the principle. But, I did not agree that the principle was applicable to this case. Every encroachment is not necessarily an expropriation. It is so only if the en-

croacher claims the property in the encroachment. Here, the defendants did not claim any right of property in the land encroached upon. It was absolutely useless to them. It merely formed part of their wall which could, technically, be shaved off. The first defendants did not sell or purport to sell the 3-4 sq ft of encroachment to the second and third defendants, nor did the latter parties buy nor purport to buy the encroached area. What was sold was No 73A Kovan Road with a surveyed area under a title document which did not include the intruding area. The issue of expropriation was irrelevant.

The real question, to my mind, was whether the defendants should be made to pull down the wall entirely and erect a new wall in its place or to shave the wall to remove the 3-4 sq ft of intrusion which the first defendants did not want and did not claim, but which unfortunately they put there. But this was not a case of deliberate encroachment but one due to carelessness. The nature and extent of the encroachment proved this. Accordingly, I was of the view that counsel was looking at the practical problem and the legal issue from the wrong perspective. Leaving aside all the peripheral facts, the central fact is that the encroachment has no effect on the living space within the four walls of the affected house. Even this might be set right without requiring demolishing or shaving the wall. The only thing that was and continues to be affected is the notional boundary line. Two portions of the wall of No 73A have intruded, very slightly, extending from 4 inches to 0.0001 inch across the boundary line. If in fact the plaintiffs had built their wall touching the entire length of No 73A Kovan Road, the legal problem might have resolved itself in that the boundary would then run in between the two walls. No evidence has been adduced by the plaintiffs to show why this could not have been done.

As to the law, the decision of Thean J in *Tay Tuan Kiat* v *Pritam Singh*[1] was referred to. In that case, TTK sued PS for trespass and sought a mandatory injunction to remove an intruding retaining wall (erected by PS) and erect a new wall on the boundary line. Applying the principle that the court should achieve a fair result followed by Buckley J in *Charrington* v *Simons & Co Ltd*[2] and Megarry J in *Shepherd Homes Ltd* v *Shandham*,[3] the court refused the injunction in that form on the ground that the cost to PS in doing so was out of proportion to any benefit that would be gained by TTK. Instead, the court ordered the chain-linked fence on the retaining wall to be removed and re-erected on the common boundary. The result was that TTK got his land back together with retaining wall.

The facts of the case before me are admittedly different, but the differences are not material. In a sense, the plaintiffs would not 'recover' the 3-4 sq ft of encroachment so long as it is not removed. But, as I have said earlier, the plaintiffs could have but refused to recover it by refusing to build wall to wall. In doing so, the plaintiffs have made it more difficult and costly to remove the encroachment. Even if this court were to order the removal of the encroachment by shaving it off, what the plaintiffs would have would be, in fact, 3-4 sq ft of air space trapped between two walls and which had no practical use or benefit to either party.

The principle applied by Thean J is that of achieving a fair result in the circumstances of the case. In applying the principle, I concluded that, on the evidence, the granting of an immediate mandatory injunction would not be a fair result

Application dismissed.

Solicitors: *Cheong & Cheong*; *Harry Elias & Partners*; *HK Koh & Teo.*

Reported by *Kevin Mathews*

Societe Generale & Ors v City Holdings (Pte) Ltd & Anor

HIGH COURT (SINGAPORE) — SUIT NO 1734 OF 1987
CHUA J
30 NOVEMBER 1990

Civil Procedure — Interim injunction — Whether injunction should have been granted on ex parte motion — Balance of convenience — Balance of convenience need not be considered where plaintiff establishes more than a good arguable claim and defendant has no arguable defence — Material non-disclosure of facts not a ground for discharging interim injunction when such facts should be tried at trial

The first plaintiffs are a French bank with branches in, amongst other places, Manila and Singapore. The second and third plaintiffs are partners of a public accountants firm who had been appointed to be receivers to receive all rents, profits, etc due from mortgaged property belonging to the first defendants. The first plaintiffs ('SG') had entered into the deed of mortgage with the first defendants ('City') in consideration of US$8m lent to or advanced for the benefit of the second defendants ('Krome'). Neither City nor Krome repaid to SG the term loan and eventually, SG's solicitors served a written notice on City that, pursuant to the Land Titles Act (Cap 157, 1985 Ed), SG intended to enter into possession of the mortgaged property and to receive the rents and profits thereof at the expiration of one month from the date of the letter. SG also appointed the second and third plaintiffs to be receivers and later gave them a power of attorney under which they are empowered as agents of SG to enter into and take possession of the mortgaged property and, inter alia, to grant leases and tenancies.

In June 1987, SG instituted the present action against the defendants claiming, inter alia, payment to the bank of the principal sum of US$8m and interest. City also filed a writ against the plaintiffs seeking a declaration, inter alia, that the mortgage was void and that the appointment of the second and third plaintiffs as receivers of income was void. City took out an O 14 application against the second and third plaintiffs, and at this hearing, the deputy registrar gave summary judg-